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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOHN ESPINOZA, an individual

Plaintiff,

v.

CITY OF IMPERIAL, a public entity; MIGUEL COLON, an individual; IRA GROSSMAN, an individual; and DOES 1-50, inclusive

Defendants.

CASE NO. 07 CV 2218 LAB (RBB)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT IRA GROSSMAN'S ANTI-SLAPP MOTION TO STRIKE PLAINTIFF'S COMPLAINT [C.C.P. § 425.16]

[ORAL ARGUMENT REQUESTED]

Date: **June 2, 2008**
Time: **11:15 a.m.**
Judge: **Hon. Larry A. Burns**
Ctrm: **9**

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///

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

CASES

///
///

STATUTES

OTHER

I. INTRODUCTION

Plaintiff John Espinoza was terminated from his position as a police officer with the CITY OF IMPERIAL ("City") following a psychological evaluation which found him unfit for duty. He now alleges defamation, invasion of privacy and intentional infliction of emotional distress against Defendant IRA GROSSMAN ("Dr. Grossman"), the psychologist retained by City to perform the evaluation. Dr. Grossman, in conducting his evaluation of Plaintiff, and in forwarding his fitness report to City and Colon was properly making communications in connection with official proceedings related to investigation of Plaintiff's fitness and potential termination of his employment from the City. These communications constitute precisely the type of free speech that is protected by California Code of Civ. Proc. Section 425.16. Accordingly, Dr. Grossman files this instant Motion to Strike pursuant to the California Anti-SLAPP statute.

II. AUTHORITY FOR MOTION

The California Legislature enacted the Anti-SLAPP statute to address a concern that too many lawsuits had created a chilling effect on the exercise of the constitutional right to free speech. (*Dowling v. Zimmerman*, 85 Cal. App.4th 1400 (Cal Ct. App. 2001).) The Anti-SLAPP statute is intended to provided a fast and inexpensive "unmasking" and potential dismissal of actions that implicate a defendant's constitutional rights and privileges. (*Id.*) The statute permits a defendant to respond to such a lawsuit with a special motion to strike, early in the litigation, which effectively compels **the plaintiff** to produce sufficient evidence to show **both**: 1) the complaint is legally sufficient; and 2) the complaint is supported by a sufficient prima facie showing of facts to sustain favorable judgment if the evidence submitted thereby is credited. (*Matson v. Dvorak*, 40 Cal. App. 4th 539, 548 (Cal. Ct. App. 1995).) If the plaintiff cannot meet these prerequisites, the complaint is stricken.

The Anti-SLAPP statute was intended to have a **broad** application. (*Averill v. Superior Court*, 42 Cal. App. 4th 1170 (Cal. Ct. App. 1996).) In fact, in 1997, the Legislature amended this statue to **expressly *require*** its broad interpretation by the courts. (See Cal. Code Civ. Proc. § 425.16(a) ["... this section shall be construed broadly"].) This express statutory requirement governs to date.

Finally, it should be noted that California's Anti-SLAPP statute applies in federal court. (*Dealertrack, Inc. v. Huber*, 460 F. Supp.2d 1177 (C.D. Cal. 2006); *Thomas v Fry's Electronics, Inc.*,

400 F.3d 1206 (9th Cir. 2005).)

III. APPLICATION OF THE ANTI-SLAPP STATUTE

The Anti-SLAPP statute requires this Court to take a two-step approach:

First, this Court must determine whether Plaintiff's Complaint implicates Dr. Grossman's free speech and petition rights, within the meaning of, and as defined by, the express terms of any of the provisions within Section 425.16, subsection (e). It is Dr. Grossman's burden of proof to show that Plaintiff's "cause of action arises from the exercise of [his] free speech or petition activity," as such is defined by the Anti-SLAPP provisions. (*Church of Scientology of California v. Wollersheim*, 42 Cal. App. 4th 628, 646-647 (Cal. Ct. App. 1996) [emphasis omitted], *overruled on other grounds in Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 68 n.5 (Cal. 2002); *see also*, Cal. Code Civ. Proc. § 425.16(e) [defining the types of speech protected thereby].)

Under this burden, Dr. Grossman is ***not*** required to establish that his actions are constitutionally protected under the First Amendment as a matter of law; rather, he must only show that Plaintiff's claims arise from the speech of Dr. Grossman made in furtherance of his rights of free speech and/or petition, as defined by subdivision (e) of the statute itself. (*Paul for Council v. Hanyecz*, 85 Cal. App. 4th 1356 (2001), *overruled on other grounds in Equilon*, 29 Cal. 4th at 68 n.5; *see also, Chavez v. Mendoza*, 94 Cal. App. 4th 1083, 1089 (Cal. Ct. App. 2001).) Further, Dr. Grossman is ***not*** required to show Plaintiff's motive in bringing the present matter, i.e., to "chill" his speech or otherwise, in order to invoke the protection of the Anti-SLAPP statute. (*Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 305-307 (Cal. Ct. App. 2001).) Moreover, that the alleged speech has purportedly concluded, and is not ongoing, does ***not*** affect the applicability of Section 425.16. (*Chavez*, 94 Cal. App. 4th at 1090.)

Second, if the court finds that Plaintiff's Complaint does implicate Dr. Grossman's rights under the Anti-SLAPP statute, **Plaintiff** is required to show that there is a probability that he will prevail on his claim. (*Shekhter v. Financial Indemnity Company*, 89 Cal. App. 4th 141, 151 (Cal. Ct. App. 2001).) In order to satisfy this second prong, Plaintiff must demonstrate that the complaint is **both**, 1) legally sufficient, and 2) supported by a sufficient prima facie showing of facts to demonstrate the probability that he will be the prevailing party in the litigation. (*Id.* at 150-151.) In demonstrating the second prong,

i.e., a probability of prevailing at trial, Plaintiff must establish that there are no constitutional or statutory defenses that apply to protect Dr. Grossman's conduct. (*eCash Technologies, Inc. v. Guagliardo*, 210 F. Supp. 2d 1138 (C.D. Cal. 2001).) In fact, where such defenses are shown to exist in favor of the defendant, the Plaintiff must bring forth evidence to actually **negate** those defenses. (*Id.*)

When assessing the probability a plaintiff will prevail at trial, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based, as well as relevant materials submitted by way of a request for judicial notice. (Cal. Civ. Proc. Code § 425.16(b)(2).) However, the trial court may only consider evidence that will be **admissible** at trial. (*Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1110 (N.D. Cal.1999).) Accordingly, this Court must determine whether or not the evidence offered by Plaintiff, if any, is first, admissible, and second, sufficient to meet the requisite burden, in deciding whether the Complaint is properly stricken under the Anti-SLAPP statue.

IV. PLAINTIFF'S ALLEGATIONS AGAINST DR. GROSSMAN ARE WITHIN THE SCOPE OF THE ANTI-SLAPP STATUTE

Plaintiff's lawsuit arises out of the following events: He was terminated from his position as a police officer with the City of Imperial ("City") following a psychological evaluation by Dr. Grossman, which found him unfit for duty. The essence of Plaintiff's lawsuit against Dr. Grossman is that Dr. Grossman made statements in a psychological report to the City and its police chief, Colon, regarding Plaintiff's lack of fitness to continue to serve as a police officer. Specifically, Dr. Grossman is being sued for his role in making communications to public entity related to official proceedings regarding Plaintiff's continued employment as a police officer.

Also, as alleged in Plaintiff's complaint, Plaintiff has "mental disabilities and/or medical conditions" (Complaint, ¶ ¶ 57, 67) which he asserts made him eligible for an accommodation under the Americans with Disabilities Act (ADA) (Complaint ¶¶ 44-53). Under the ADA, an employer is permitted to require a medical examination as to whether such employee is an individual with a disability or as to the nature and severity of the disability. (*See* 42 U.S.C. § 12112(d)(4)(A).) In light of the allegations of the complaint, Dr. Grossman's communications, as set forth in his report, can also be construed as being made in accordance with the exercise of legally protected rights.

As discussed more fully below, the alleged speech and/or conduct of Dr. Grossman falls squarely within the protection of the Anti-SLAPP statute. (Cal. Civ. Proc. Code § 425.16(e)(1) and (2).)

A. Dr. Grossman's Speech Made Before and in Connection with Official Proceedings Regarding Plaintiff's Continued Employment as a Police Officer is Protected Under Sections 425.16(e)(1) and (e)(2).

The first two categories of speech afforded protection under the Anti-SLAPP statute are those made "before" or "in connection with" a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law. (Cal. Civ. Proc. Code § 425.16(e)(1) and (2).) In the spirit of the mandatory "broad" interpretation of the Anti-SLAPP statute, any speech made in connection with the stated proceedings falls within the protection of Section 425.16. In fact, "the California Supreme Court has observed that the term 'official proceeding' 'has been interpreted broadly to protect communications to and from *governmental* officials *which may precede the initiation of formal proceedings*.'" (*Computerxpress, Inc. v. Jackson*, 93 Cal.App.4th 993,1009 (Cal. Ct. App. 2001); *see also, Rohde v. Wolf,* 154 Cal.App.4th 28, 35 (Cal. Ct. App. 2007) ["Just as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 46, subdivision (b), such statements are equally entitled to the benefits of section 425.16"].) Thus, communications to a public entity or agency "designed to prompt action by that agency is a much a part of the 'official proceeding' as a communication made after the proceedings had commenced." (*Kim v. Walker*, 208 Cal.App.3d 375, 383 (Cal. Ct. App. 1989).)[1]

In the instant case, Dr. Grossman's communications were made in connection with official proceedings by the City regarding Plaintiff's continued employment as a police officer. The City engaged Dr. Grossman to evaluate Plaintiff's fitness to serve as police officer preparatory to the initiation of termination proceedings if the evaluation showed that Plaintiff was unfit. (Complaint ¶ 13, 14, 15.) Dr. Grossman's actions/communications were intended to prompt action by the City (to terminate Plaintiff) if he was deemed to be unfit. Not only were Dr. Grossman's communications made

[1]California appellate courts have found the following statements/communications to be made in connection with "official proceedings" and thus within the ambit of California's anti-SLAPP statute: (1) statements to investigative officers regarding a policeman's conduct. (*Williams v. Taylor*, 129 Cal.App.3d 745, 753 (Cal. Ct. App. 1982); (2) communications between parents and school board (*Brody v. Montalbano*, 87 Cal.App.3d 725, 732-33 (Cal. Ct. App. 1978); and (3) statements to IRS agents investigating tax fraud (*Tiedemann v. Superior Court*, 83 Cal.App.3d 918, 924-926 (Cal. Ct. App. 1978).

in contemplation of official termination proceedings, the communications themselves were expressly authorized by law. (See Cal. Civil Code section 56.10(c)(8)(B) [disclosures regarding a person's fitness to perform his or her present employment is authorized by law]; *Shaddox v. Bertani*, 110 Cal App.4th 1406 (Cal. Ct. App. 2003) [reports regarding the fitness for duty of police officers are authorized by law].

Alternatively, and as an additional basis for application of the Anti-SLAPP statute, is the fact that a psychological examination of Plaintiff was warranted based upon Plaintiff's claims that he had "mental disabilities" and thus was a "qualified individual with a disability" within the ambit of the ADA. Reports following a medical examination regarding the nature and extent of the disability claimed by the Plaintiff are made in accordance with the exercise of legally protected rights (see 42 U.S.C. § 12112(d)(4)(A)) and in anticipation of judicial or quasi-judicial proceedings. It is well-established in California law that the absolute privilege afforded by Civil Code section 47(b) extends to communications made in anticipation of litigation (*Flores v. Emerich & Fike*, 416 F. Supp.2d. 885 (E.D. Cal. 2006). Morever, the existence of an alternative to litigation (such as proceedings before California's Department of Fair Employment and Housing of the Federal Equal Opportunity Commission) does not necessarily eliminate the 47(b) privilege. (*See e.g., Wilton v. Mountain Wood Homeowner's Assn*, 18 Cal. App.4th 565 (Cal. Ct. App. 1993).)

Simply stated, all of the alleged communications attributed to Dr. Grossman, by and through Plaintiff's Complaint, fall within the ambit of the Anti-SLAPP statute.

V. PLAINTIFF CANNOT MEET HIS STATUTORY BURDEN OF PROOF

To satisfy this second prong of the Anti-SLAPP statute, Plaintiff must demonstrate his Complaint is **both**, 1) legally sufficient, and, 2) supported by a prima facie showing of facts to demonstrate a probability of prevailing in the litigation. (*Shekhter*, 89 Cal. App. 4th at 151.) Plaintiff must establish there are no constitutional or statutory defenses that apply to protect Dr. Grossman's statements. (*eCash Technologies*, 210 F. Supp. 2d at 1138.)

Here, it is **certain** that Plaintiff cannot show a probability of prevailing at trial because Dr. Grossman has absolute immunity from Plaintiff's claims because those claims are absolutely privileged under California Civil Code section 47(b) and qualifiedly privileged under section 47(c). As a result,

Plaintiff cannot meet his burden of proof under the Anti-SLAPP statute as a matter of law.

A. Plaintiff's Claims Against Dr. Grossman are Barred by Civil Code 47(b)

Plaintiff's Complaint should be dismissed because any statements made by Dr. Grossman in his fitness report are protected by the privileges afforded by California Civil Code section 47.[2] The litigation privilege is *absolute* and applies to any communication that has "some relation" to a judicial or official proceeding. (*Kashian v. Harriman*, 98 Cal. App. 4th 892, 913 (Cal. Ct. App. 2002).) Courts apply the litigation privilege to judicial, quasi-judicial, and other official proceedings because "the external threat of liability is destructive ... and inconsistent with the effective administration of justice." *(Silberg v. Anderson*, 50 Cal. 3d 205, 213 (Cal. 1990), quoting *McClatchy Newspapers, Inc. v. Superior Court*, 189 Cal. App. 3d 961, 970 (Cal. Ct. App. 1987).)

Importantly, although it was originally enacted in response to defamation claims, (*Kashian*, 98 Cal. App. 4th at 913), the absolute litigation privilege now "applies to *any* action except one for malicious prosecution." *(Pacific Gas & Electric Co. v. Bear Stearns Co.*, 50 Cal. 3d 1118, 1132 (Cal. 1990) [emphasis added].) (*See, e.g., Silberg*, 50 Cal. 3d at 213 [disapproving of lower appellate court decisions that allowed certain tort actions, other than malicious prosecution, to proceed on the basis of an "interest[s] of justice" exception]; *Navarro v. IHOP Properties, Inc.*, 134 Cal. App. 4th 834, 844 (Cal. Ct. App. 2005) [stating that the absolute litigation privilege of California Civil Code section 47, "applies to all torts other than malicious prosecution, including fraud, negligence, and negligent misrepresentation" (internal quotes and citations omitted).].) "*Any doubt as to whether the privilege applies is resolved in favor of applying it.*" (*Adams v. Superior Court*, 2 Cal. App. 4th 521, 529 (Cal. Ct. App. 1992) [emphasis added].)

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[2] The pertinent sections of California Civil Code section 47, are as follows:

A privileged publication or broadcast is made:

(a) In the proper discharge of an official duty

(b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1048) of Title 1 of Part 3 of the Code of Civil Procedure ...

1. Reports Regarding the Fitness of a Police Officer are Absolutely Privileged Under Section 47(b)

Dr. Grossman's communications to the City and Colon regarding Plaintiff and his fitness to serve as a police officer are absolutely privileged under Civil Code section 47(b). (See *Shaddox v. Bertani*, 110 Cal.App.4th 1406 (Cal. Ct. App. 2003).) In *Shaddox*, a member of the San Francisco Police Department sustained an injury to the right side of his face, which required dental work among other treatment. Officer Shaddox was prescribed Vicodin, and the prescription was refilled at least twice. When Officer Shaddox visited his dentist, Dr. Bertani, to obtain a further prescription for Vicodin, Dr. Bertani refused to prescribe it for him. Officer Shaddox then became very upset. Concerned that Shaddox might be dependent on narcotic pain medication, Dr. Bertani called the SFPD to report the situation. After an ensuing internal investigation, Officer Shaddox was disciplined for improper conduct, was assigned to a desk job and was not allowed to carry a firearm. Shaddox then sued Dr. Bertani asserting, among other claims, causes of action for invasion of privacy and intentional infliction of emotional distress. The trial court entered judgment in favor of Dr. Bertani, finding that his actions were protected by Civil Code 47(b).

The appellate court affirmed, stating:

> 'Police officers occupy a unique position of trust in society. They are responsible for enforcing the law and protecting society from criminal acts. They are given the authority to detain and arrest and, when necessary, to use deadly force'; this authority ultimately rests upon 'the community's confidence in the integrity of its police force.' (Citations omitted) . . . **California has a policy of encouraging reports concerning suspected misconduct or unfitness by law enforcement officers. . . .Complaints are regarded as privileged by section 47, subdivision (b)(3). . . .Complaints or communications regarding an officer's fitness or performance of duty are firmly established as being within this privilege.**

(Shaddox, supra, 110 Cal.App.4th at 1415-1416 [emphasis added]; *see also, Williams v. Taylor*, 129 Cal.App.3d. 745, 753-54 (Cal. Ct. App. 1982).)

In light of these facts and in accordance with *Shaddox*, Dr. Grossman's report was unquestionably a privileged communication and cannot, as a matter of law, be a basis for liability.

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2. The 47(b) Privilege Applies to the Reports of Experts in Truth-Seeking Inquiries

The Civil Code section 47(b) privilege is usually applied to communications made in the course of or in relation to judicial or quasi-judicial proceedings. However, the policy served by the privilege of 47(b) applies not only to judicial proceedings but also to all truth-seeking inquiries. (*Crowley v. Katleman*, 8 Cal.4th 666, 695 (Cal. Ct. App. 1994).)

In judicial and other truth-seeking inquiries, experts, such as Dr. Grossman, are often retained to assist in the truth seeking process. Oftentimes, these experts are later sued by the losing or disgruntled party. However, such lawsuits are barred by the 47(b) privilege.

For instance, in a case with particular relevance here, *Gootee v. Lightner,* 224 Cal.App.3d 587 (Cal. Ct. App. 1990), the husband in a marital dissolution action sued the psychologist expert jointly retained by he and his ex-wife, after the psychologist prepared a report and subsequently testified that the wife should have custody of the couple's children. The trial court granted the psychologist's motion for summary judgment on the basis of the 47(b)privilege and the appellate court affirmed. The *Gootee* court reasoned: "Freedom of access to the courts and encouragement of witnesses to testify truthfully will be harmed if neutral experts must fear retaliatory lawsuits from litigants whose disagreement with an expert's opinion perforce convinces them the expert must have been negligent in forming such opinions." (*Gootee, supra,* 224 Cal.App.3d at 593; *see also, Howard v. Drapkin,* 222 Cal.App.3d 843, 860 (Cal. Ct. App. 1990) [absolute privilege of 47(b) extends to neutral third party expert psychologist who makes evaluations in reference to judicial or quasi-judicial proceedings].)

Here, as in *Gootee* and *Howard*, Dr. Grossman was retained as a neutral expert. He was asked to evaluate Plaintiff's continuing fitness to serve as a police officer. He prepared a report as to his findings, with which report Plaintiff apparently disagrees. Because the report was prepared as part of a truth-seeking process preparatory to decision-making by an official body, it is absolutely privileged under 47(b). "To accomplish the purpose of judicial or quasi-judicial proceedings, it is obvious that the parties or persons interested must confer and must marshal their evidence for presentation at the hearing. The right of private parties to combine and make presentations to an official meeting and, as a necessary incident thereto, to prepare materials to be presented is a fundamental adjunct to the right of access to judicial and quasi-judicial proceedings. . . . Accordingly, we conclude that the privilege [of 47(b)]

applies to bar appellants' tort claims against respondents." (*Gootee, supra,* 224 Cal.App.3d at 594, 596, quoting *Pettitt v. Levy*, 28 Cal.App.3d 484, 490-91 (1972).)

Plaintiff's instant claims against Dr. Grossman are simply barred by application of the 47(b) privilege. Dr. Grossman's motion to dismiss must be granted.

3. Dr. Grossman's Communications Are Also Protected by the "Common Interest" Privilege of Section 47(c)

Dr. Grossman's communications are further privileged under Civil Code section 47(c). This subdivision applies to a communication:

> ...without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." Cal. Civ. Code § 47(c).

This "common interest" privilege had been applied in several diverse instances. For example, in *Katz v. Rosen*, 48 Cal.App.3d 1032 (Cal. Ct. App. 1975), the court applied the privilege in a libel action against a doctor who had written a letter to the local bar association complaining of the an attorney's conduct. In *Taus v. Loftus*, 40 Cal.4th 683 (Cal. Ct. App. 2007), the privilege was applied where a psychology professor referred anonymously to the subject of a case study on child sexual abuse while speaking at a conference of mental health professionals. And in *Jackson v. Mills Corp.*, 2007 WL 2705215 (N.D. Cal.), the district court dismissed a complaint against a defendant who had reported various complaints of sexual harassment by female shoppers at a mall to the plaintiff's employer, resulting in the plaintiff's termination.

The above cases require application of the common interest privilege in this case. Dr. Grossman's communications to supervisory personnel within the police department were made to further those defendants' interest in assessing Plaintiff's fitness for duty. Both City and Colon had a legitimate interest in obtaining this assessment as Plaintiff's employer and highest-level supervisor, respectively. It was also their request which prompted Dr. Grossman to conduct the evaluation, a fact which Plaintiff admits in his complaint. (See Complaint ¶ 6.)

Although the common interest privilege is a *qualified* privilege and can be overcome by a showing of malice, this does not save Plaintiff's claims against Dr. Grossman. First, Plaintiff fails to

even allege malice against Dr. Grossman individually. In his ninth cause of action for invasion of privacy, Plaintiff refers to "Defendant" in the singular and after alleging that"Defendant" acted maliciously, states that "Defendant's wrongful conduct was carried out and ratified by a managing agent, or officer, or director, of the CITY, which had advance knowledge of the unfitness of its decision-maker." (Complaint ¶ 125.) This wording must refer only to Defendant Colon, as Dr. Grossman is not alleged to have had authority to render a decision regarding Plaintiff's employment status. Plaintiff's eleventh cause of action for defamation contains identical language. (See Complaint ¶ 151.)

Should the Court find that Plaintiff has alleged malice against Dr. Grossman, this still would not be sufficient to overcome the qualified common interest privilege. More than mere allegations of malice are required. (*Martin v. Kearney*, 51 Cal.App.3d 309, 312 (Cal. Ct. App. 1975) (affirming trial court's grant of judgment on the pleadings).) A plaintiff must allege actual facts supporting the claim of malice and not general conclusions. (*Lesperance v. North Am. Aviation, Inc.*, 217 Cal.App.2d 336, 341 (Cal. Ct. App. 1963).) Here, the complaint merely makes a general allegation that "Defendant committed the acts alleged herein maliciously, fraudulently, and oppressively." (Complaint ¶¶ 125 and 151.) This allegation is conclusory form language, but nothing more. It is insufficient to allege malice on the part of Dr. Grossman.

Finally, various statements in Plaintiff's own complaint undermine any assertion by him that Dr. Grossman acted with malice. For instance, Plaintiff concedes, as mentioned above, that Dr. Grossman was asked by the City and Colon to evaluate Plaintiff's fitness to serve as a police officer; that this request was made after Plaintiff went through a contentious divorce and after Plaintiff began to suffer from mental disabilities. (See Complaint ¶¶ 11, 57, 67, 129.) Plaintiff further admits in his complaint that Dr. Grossman did not over-publish his report, as he concedes that Dr. Grossman limited the dissemination of his report to the City and Colon only – those with a common interest in Plaintiff's fitness. (See Complaint ¶ 17.)

In sum, the common interest privilege of Civil Code section 47(c) applies and also serves to bar Plaintiff's claims herein.

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4. *Pettus v. Cole* Does Not Apply Based On The Allegations of Plaintiff's Complaint

Defendant anticipates that Plaintiff will argue that the privileges under section 47 do not apply to his claim for invasion of privacy based on the holding of *Pettus v. Cole,* 49 Cal.App.4th 402 (Cal. Ct. App. 1996). However, *Pettus* does not apply on the facts of this case, and does not address the application of section 47(a) and (b)(3).

In *Pettus*, the plaintiff, Louis Pettus, was an employee of Du Pont, a private employer. (*Id.* at p. 414.) After working for Du Pont for 22 years, Pettus requested disability leave based on a stress-related condition. (*Ibid.*) Du Pont's disability leave policy required Pettus to submit to an examination by doctors selected by Du Pont. (*Id.* at p. 415.) Pettus therefore submitted to examinations by a physician and two psychiatrists, Drs. Cole and Unger, arranged and paid for by Du Pont. (*Ibid.*) Following these examinations, the doctors disclosed detailed information to Pettus's employer regarding Pettus's emotional and medical condition, psychiatric symptoms, social history, and potential alcohol problems. (*Id.* at pp. 420-422.) Du Pont subsequently terminated Pettus after he refused to enter an alcohol rehabilitation program. (*Id.* at p. 424.) Pettus brought claims against Drs. Cole and Unger for releasing his detailed medical information in violation of the Confidentiality of Medical Information Act ("CMIA"), and for invasion of privacy, as well as separate claims against his employer. (*Id.* at p. 413.) The trial court granted the doctors' motions for judgment following Pettus's case-in-chief. (*Id.* at p. 413.)

On appeal, *Pettus* held that the doctors' disclosures of "detailed medical and psychiatric information" to Pettus's employer violated his privacy rights. (*Id.* at pp. 447-448.)[3] Specifically, the court found that a serious violation of Pettus's expectation of privacy occurred when Drs. Cole and Unger disclosed private information related to Pettus's body rash, medications, fears regarding medications, sleep patterns, sex drive, hostile feelings toward coworkers, suicidal thoughts, smoking and drinking, and social and family history, as well as specific details of Pettus' emotional behavior during the examinations. (*Id.* at p. 441.) The court stated that an employer should not be allowed access to

[3] *Pettus*'s holding that Drs. Unger and Cole violated provisions of the CMIA (*Id.* at p. 425) is irrelevant here, as Plaintiff has not brought any claims against Grossman for violation of the CMIA. Moreover, Plaintiff fails to allege any facts constituting a violation of the CMIA. In fact, the alleged disclosures made by Dr. Grossman were specifically authorized by subdivision (c)(8)(B) of the CMIA.

"detailed family or medical histories" and "mental processes," absent consent or "some other substantial justification." (*Id.* at p. 443.) The court further found that there was no adequate justification for the disclosure. The court elaborated,

> . . . we recognize that employers have important and legitimate interests in maintaining an efficient and productive work force . . . ***They are, thus, entitled to notice when an employee cannot perform some or all of the essential job functions assigned to that employee*** and, if the employee hopes to avail himself of paid leave benefits, to such information as is necessary to make an evenhanded decision about the employee's eligibility for such leave. But again, a medical opinion by an employer-aligned physician as to the existence of "functional limitations," and as to the "industrial versus nonindustrial" nature of the injury, is what the employer "needs" to know to make that eligibility determination.

(*Id.* at p. 446; emphasis added.) *Pettus* held that the "detailed psychiatric information Du Pont requested and obtained from Drs. Cole and Unger, and ultimately used to make adverse personnel decisions about Pettus, was *far more* than the employer needed to accomplish its legitimate objectives." (*Id.* at p. 442; emphasis in original.)

Plaintiff's allegations in the instant matter are clearly distinguishable from the disclosure of detailed psychiatric information and history to a private employer in *Pettus*. Here, Plaintiff's only factual allegations related to Dr. Grossman are that Dr. Grossman stated in writing that Plaintiff lacked integrity and was unfit for duty. (Complaint ¶ 17.) As a matter of law, Plaintiff did not have any reasonable expectation of privacy with regard to this information. As the *Pettus* court discussed, subdivision (c)(8)(B) of the CMIA specifically authorizes disclosure of employment-related healthcare where it describes functional limitations that may "limit the patient's fitness to perform his or her present employment, provided that no statement of medical cause is included in the information disclosed." (Cal. Civil Code section 56.10(c)(8)(B).) Unlike the extensive disclosures in *Pettus*, Plaintiff's allegations that Dr. Grossman declared him unfit for duty and lacking in integrity were clearly authorized as a matter of law under subdivision (c)(8)(B), as descriptions of functional limitations that may limit the employee's fitness for duty. Thus, there was no violation of any expectation of privacy. Further, *Pettus* addressed disclosures to a *private* employer regarding an employee, and the employer's *private* policies related to disability determination. *Pettus* did not involve the fitness of a peace officer for duty, and official proceedings related thereto. As discussed in *Shaddox*, *supra*,

> Police officers occupy a unique position of trust in our society. They are responsible for enforcing the law and protecting society from criminal acts. They are given the authority to detain and to arrest and, when necessary, to use deadly force"; **this authority ultimately rests upon "the community's confidence in the integrity of its police force**.

(*Shaddox v. Bertani, supra,* 110 Cal.App.4th at p. 1416, citing *Mary M. v. City of Los Angeles,* 54 Cal.3d 202, 206-207 (Cal. Ct. App. 1991).) Thus, Dr. Grossman's alleged disclosures regarding Plaintiff's fitness and integrity clearly served a legitimate purpose specifically authorized by the CMIA, and therefore outweighed any perceived privacy right as a matter of law.

Although *Pettus* held that Civil Code sections 47(b)(2) and (c) did not apply to Pettus's claims against Drs. Cole and Unger (*Id.* at p. 436), *Pettus* did not address the application of section 47(b)(3), addressed in the instant Motion. With regard to the application of section 47(b)(2), *Pettus* held that the employee's request for leave and DuPont's disability determination were not judicial or quasi-judicial proceedings falling under that section because there was "no dispute resolution mechanism, no hearings, and the only decision-makers involved were a *private employer*, Du Pont, and its employees and agents." (*Id.* at p. 438; [emphasis added].) *Pettus* did not involve an official proceeding related to the fitness of a peace officer, as in the instant matter.

In holding that section 47(c) did not apply, the *Pettus* court stated, "When the communication involves a disclosure of an employee's medical information by a health care provider to an employer, the more specific privileges established by the CMIA supersede the general privilege afforded under section 47(c)." (*Id.* at p. 438.) As discussed above, Plaintiff alleges no violation of the CMIA. In fact, the alleged disclosures by Dr. Grossman were clearly authorized under the CMIA. Thus, in our matter there is no violation of the CMIA that supersedes the privilege set forth under section 47(c).

In sum, Plaintiff may not use Dr. Grossman's fitness report as a basis for claims against Dr. Grossman, because Dr. Grossman is afforded absolute immunity under the privileges established by California Civil Code section 47. Specifically, any statements made by Dr. Grossman in his fitness report were made preparatory to an official proceeding, where his participation and statements were authorized by law, and were logically related to achieving the objectives of the official proceeding. His statement were also made to a person/entity with a common interest in the subject matter of his report. Thus, Plaintiff fails to demonstrate a probability of prevailing at trial, because he fails to state a claim

upon which relief may be granted and because no amendment can or will correct this defect of the pleadings.

VI.

DR. GROSSMAN IS ENTITLED TO FEES AND COSTS INCURRED IN RESPONDING TO PLAINTIFF'S COMPLAINT

The prevailing party on a Motion to Strike under the California Anti-SLAPP statute is entitled to recover its attorneys fees and costs. (Cal. Civ. Proc. Code § 425.16(c).) The award of attorneys fees and costs to a successful defendant under the Anti-SLAPP statute is mandatory. (*Pfeiffer Venice Properties v. Bernard*, 101 Cal. App. 4th 211 (Cal. Ct. App. 2002); *see also, Ketchum v. Moses*, 24 Cal. 4th 1122 (Cal. 2001) ["any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees"].) "The right of prevailing defendants to recover their reasonable attorney fees under [S]ection 425.16 adequately compensates them for the expense of responding to a baseless lawsuit." (*Robertson v. Rodriguez*, 36 Cal. App. 4th 347, 362 (Cal. Ct. App. 1995).)

The purpose of the Anti-SLAPP statute is promoted by construing the provision broadly to allow a defendant to recover mandatory reasonable attorney fees for the legal services actually provided in response to a SLAPP suit. (*Dowling*, 85 Cal. App. 4th at 1400.) "Reasonableness depends in part on 'the success of the attorney's efforts'." (*Metabolife International, Inc. v. Wornick*, 213 F. Supp. 2d 1220, 1223 (S.D. Cal. 2002), *citing Church of Scientology of California*, 42 Cal. App. 4th at 659.)[4]

The total sum of such recovery properly reflects ***all*** aspects of the defensive litigation, including the fees incurred in connection with the Anti-SLAPP Motion, the efforts towards the recovery of the attorneys fees and costs under the Anti-SLAPP statute, and all fees generated in the offer of alternative legal arguments. (*See e.g., Dowling*, 85 Cal. App. 4th at 1425 [prevailing SLAPP

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[4] For example, in *Metabolife International*, the Southern District of California held that the prevailing SLAPP defendant was entitled to **all** of the legal fees and costs that he had incurred in retaining two firms to provide a defense against plaintiff's SLAPP lawsuit, specifically **including** those expended in asserting alternative legal grounds for the dismissal of plaintiff's lawsuit, regardless of whether those arguments were ever reached by the court. (*Metabolife International, Inc.*, 213 F. Supp. 2d at 1223.) The court further held that, because all of the causes of action against the defendant were subject to the Anti-SLAPP statute, all of his attorneys fees and costs were incurred in connection with the Anti-SLAPP Motion. (*Id.)*

defendant entitled to recover "modest" award of $9,300 in attorney fees to compensate for legal services in connection with both Anti-SLAPP Motion and the recovery of attorney fees and costs under Anti-SLAPP statute]; *see also, Metabolife International, Inc.*, 213 F. Supp. 2d at 1223-1224 [prevailing SLAPP defendant entitled to recover fees and costs of $318,687.99 incurred for preparation of Anti-SLAPP motion and assertion of alternative legal defenses in response to meritless litigation].)

Such is the case in this matter. Plaintiff's entire lawsuit against Dr. Grossman is subject to the Anti-SLAPP provision, and thus all of his fees and costs are properly recoverable. As such, Dr. Grossman is entitled to recover all fees incurred in defending himself against Plaintiff's meritless lawsuit, in an amount to determined following hearing on this Motion and an Order in Dr. Grossman's favor.

VII. CONCLUSION

Based on the foregoing, Defendant Ira Grossman respectfully requests that the Court grant his Motion to Strike Plaintiff's Complaint and enter an order awarding Dr. Grossman his fees and costs. Support for such award will be the subject of a subsequently filed Declaration.

Dated: April 7, 2008

WHITE, OLIVER & AMUNDSON

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